LIBRARY
SUPREME COURT, U. S.

FILED
JAN 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 575

STATE OF NEW JERSEY,

Respondent,

vs.

MICHAEL FRANCIS HANEY,

Petitioner,

and

CHARLES HAMPTON,

Defendant.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, STATE OF NEW JERSEY

JAMES GREENBERG,
Attorney for Respondent,

22 Haddon Avenue,
Camden, New Jersey 08103

Newark, N. J.
(201) 623-7224

N. J. Appellate Printing Co., Inc.
Law Printers

Woodbridge, N. J.
(201) 636-2030

TABLE OF CONTENTS

	Page
Statement of Questions Presented	1
Opinion Below: Jurisdiction: Constitutional Provisions Involved	2
Statement of The Case	3
ARGUMENT:	
POINT I: A search warrant meets Fourth and Fourteenth Amendment doctrine where it is issued on the basis of an application and affidavit which contains facts sufficiently precise to enable the issuing magistrate to independently evaluate the applicant's and his informant's conclusions, and where it sets forth the facts demonstrating the reliability of the applicant's informer	4
POINT II: A search warrant which provides that "if you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] . . . illegal practice" is sufficient in its particularity to meet the standard of the Fourth Amendment, and is sufficient to authorize the executing officers to intercept telephone calls made to the premises during the course of the search	5
POINT III: In prosecutions for lottery and bookmaking testimony of police officers as to bets placed by telephone callers to the defendant's premises are admissible as non-hearsay extra-judicial statements offered to prove the calls as operative facts	9
Conclusion	10

TABLE OF CONTENTS

Page

CASES CITED:

Aquilar v. Texas,
378 U.S. 108 (1964) 4

Berger v. New York,
388 U.S. 41 (1967) 8

Commonwealth v. Wiswesser,
134 Pa. Super. 488, 3A 2d 983 (1939) 9

Entick v. Carrington,
19 Howell St. Tr. 1029 (1765) 6

Fentron Architectural Metals Corp. v. Romagnino,
69 N.J. Super. 410 (App. Div. 1961) Cert. den,
36 N.J. 297 (1962) 10

Katz v. United States,
389 U.S. 347 (1967) 8

Stanford v. Texas,
378 U.S. 476 (1965) 6, 7

State v. Bisaccia,
45 N.J. 504 (1965) 6

State v. Carbone,
38 N.J. 19 (1962) 8

State v. Daniels,
46 N.J. 425 (1966) 6, 7

State v. Masco,
103 N.J. Super. 277 (App. Div. 1963) 7, 9

State v. Seefeldt,
51 N.J. 472 (1968) 6, 7

TABLE OF CONTENTS

	Page
CASES CITED:	
State v. Sheppard, 46 N.J. 526 (1966)	8
Steele v. United States, 267 U.S. 498 (1924)	6, 7
AUTHORITIES CITED:	
Federal Communications Act, 47 U.S.C. § 605	8
McCormick, Law of Evidence, 460 (1954)	9
New Jersey Rule of Evidence 63	9
U.S. Constitution, Amendment Four	5, 6, 7

STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether an affidavit offered in support of an application for a search warrant is constitutionally adequate where it gives:

(A) A specific description of the premises and of the crime being committed therein;

(B) Facts upon which the reliability of an informer can be objectively evalulated; and

(C) Details of an investigation personally conducted by the applicant officer which reveals that the suspect is seen entering and leaving the location which is sought to be searched, and that the suspect is conducting his illegal business at that location.

2. Whether a search warrant is sufficiently particular to authorize the executing officer to intercept telephone calls made to a premises during the course of a search where it contains the following authorization:

> If your there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] illegal practice.

3. Whether the Sixth and Fourteenth Amendments are respected in prosecutions for lottery and bookmaking where State's witnesses testify as to the contents of telephone calls received in the defendant's premises during the course of a warranted search?

OPINION BELOW: JURISDICTION: CONSTITUTIONAL PROVISIONS INVOLVED

The respondent (State) adopts as its own the recitations under the above headings which the petitioner has included in his petition for writ of certiorari.

STATEMENT OF THE CASE

The respondent adopts as its own the statement of the case which appears in the petitioner's brief, but adds, however, the following information:

1. New Jersey State Police Detective Anthony DeMasi, who testified for the State in rebuttal to the defendant's motion to suppress evidence taken during the course of the search, testified that after making the initial entry into the defendant's premises, before which time the incoming telephone lines were severed, he reconnected the primary line which served the premises; and

2. John J. Carney, a New Jersey State Police investigator, who also testified at that hearing, recalled that the calls which were received by the State Police during the course of their search were made on telephone number 609-963-3464, the primary line which Detective DeMasi had made operative.

ARGUMENT

POINT I

A search warrant meets Fourth and Fourteenth Amendment doctrine where it is issued on the basis of an application and affidavit which contains facts sufficiently precise to enable the issuing magistrate to independently evaluate the applicant's and his informant's conclusions, and where it sets forth the facts demonstrating the reliability of the applicant's informer.

The affidavit which supported the application for the two search warrants issued for the search of the defendant's premises conforms to applicable Fourth and Fourteenth Amendment doctrine. *See, e.g., Aguilar v. Texas*, 378 U.S. 108 (1964). The applicant, Detective George Sahlin, of the Camden City Police Department, Camden, New Jersey, first describes in detail the particular crimes which were thought to be continuously committed on the premises; namely, bookmaking, and, or, lottery. The affidavit continues by describing the defendant as one of the men known to be conducting the illegal operation. Next, there follows a precise description of the premises and its entrances.

Following those general assertions, the applicant then detailed information received by him from a confidential informer as to some of the activity which the defendant, as one of the operators, was conducting on the premises. Parenthetically, the affidavit does contain the information that past information, received from that informer, led to

the arrest of the defendant on a prior occasion for the same or similar activity. Specifically, the informer was able to give the applicant and other police officers the telephone number of a telephone which was located on the premises. In the presence of the applicant, the informer dialed that telephone number on two occasions and was able to place betting information with an individual who identified himself as "Mike" (Michael Hayney, the defendant).

Moreover, the applicant recited in the affidavit conclusions based upon his own personal surveillance of the premises. That surveillance enabled him to observe on various occasions the defendant both entering and leaving the premises.

If any generalization about the affidavit is permissible, one might only say that it is a model in its form.

Point II

A search warrant which provides that "if you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] . . . illegal practice" is sufficient in its particularity to meet the standard of the Fourth Amendment, and is sufficient to authorize the executing officers to intercept telephone calls made to the premises during the course of the search.

Under the circumstances of the instant case, *i.e.*, the peculiar crime of bookmaking and the nature of the instrumentalities incident to its perpetration, the search warrant which issued was proper under the principles of

federal and local law in both its form and execution. Recognizing the Fourth Amendment proscription against general searches to be irreproachable in purpose, *see, e.g.*, Lord Camden's opinion in *Entick v. Carrington*, 19 Howell St. Tr. 1029 (1765), discussed in *State v. Bisaccia*, 45 N.J. 504 (1965), nevertheless, the issue as to whether a search meets that standard must be resolved on the particular facts of the case; "there are no rigid rules." *State v. Daniels*, 46 N.J. 425, 436 (1966).

The scope of a search warrant is delimited by two sets of criteras; namely, description of the premises, and description of the items to be seized. Admittedly, both of those mandates are imposed because of society's determined effort to protect privacy from capricious invasions which might result if the scope of initially necessitated searches were left to the subjective discretion of zealous law enforcement personnel. See *Stanford v. Texas*, 379 U.S. 476 (1965) (which added that when literature is seized because of contained ideas it must be described with "scrupulous exactitude"):

With respect to the consideration of description of premises, state and federal cases recognize:

> It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.

See, *e.g.*, *Steele v. United States*, 267 U.S. 498 (1924); *State v. Daniels*, *supra*, at 436.

The element of description of things to be seized would appear to be controlled by the same standard. See, *e.g.*, *State v. Seefeldt*, 51 N.J. 472 (1968), where the Court, with respect to a description in a search warrant, held that the words "'weapons used in the crime of murder' . . .

were of adequate specificity to eliminate any room for the exercise of discretion by the searcher as to the items to be seized". *Id.* at 490.

The defendant draws in issue the general sufficiency of the description of the items to be seized and the particular inclusion within the warrant's language of telephone calls. The doctrines discussed above venerate the sufficiency of the warrant on both issues. See, *e.g.*, *State v. Masco*, 103 N.J. Super. 277 (App. Div. 1963), relying upon *Steele v. United States*, 267 U.S. 498 (1924) and *Stanford v. Texas*, 379 U.S. 476 (1965), which held that the description "bookmaking paraphernalia" was not only sufficiently precise, but also that:

> A telephone is an indispensable facility for a bookmaker . . . and as such obviously must be included in the description. . . . In this search for evidence to establish defendant's complicity in the crime they could lawfully receive such calls.
>
> *State v. Masco*, *supra*, at 283.

The *Masco* decision tacitly recognizes that every crime has its personal accoutrements, which depending on the situation, may or may not be described with a single word. Although a gun may be aptly described by the word gun, unfortunately the instruments of bookmaking may not of necessity have that same intrinsic identifiability. It is important that the words used conjure a sufficient Gestaldt in the minds of the executing officers. The rule of the Fourth Amendment is "reasonableness," *State v. Daniels*, *supra*, at 437, and it is not to be measured by "formalisms of no vital importance." *Id.*

Because the officers were authorized to seize the particular telephone calls related to bookmaking, they were indeed authorized to intercept all calls which came into the apartment during the circumscribed time incident to their search. That was as much a part of the authorized scope of the search as "cellars, broom closets, hallways, storage areas" are within the authorized scope of a search warrant directing the search of "such areas as are under the custody and control of a superintendent of . . . building. . . .". *Cf. State v. Sheppard*, 46 N.J. 526 (1966). See also *State v. Carbone*, 38 N.J. 19, 22 (1962).

Within this framework it cannot be said that the interception of the defendant's telephone calls violated either the letter or spirit of *Berger v. New York*, 388 U.S. 41 (1967), or *Katz v. United States*, 389 U.S. 347 (1967). Here we have, as contradistinguished from the facts in those cases, a narrowly circumscribed "surveillance" — if that term is appropriate here — which was authorized by a Superior Court judge who was notified of the need for the search. *Katz*, 389 U.S. at 354. Moreover, the case at bar does not present a surreptitious eavesdropping which was the subject of the Court's consternation in those decisions.

With respect to the dictates of the Federal Communications Act, 47 U.S.C. §605, as it has been construed in *State v. Carbone*, 38 N.J. 19 (1962), the State urges that the telephone calls were not intercepted by violating the integrity of the line; at the time the phone calls were received, the line was restored to its original condition.

POINT III

In prosecutions for lottery and bookmaking testimony of police officers as to bets placed by telephone callers to the defendant's premises are admissible as non-hearsay extra-judicial statements offered to prove the calls as operative facts.

In bookmaking and lottery prosecutions testimony as to incoming telephone calls received by police officers during the course of a search have been traditionally admitted into evidence. See, *e.g., State v. Masco, supra*, at 283, and the cases cited therein. Although less than explicit as to the justification and theory of admissibility, those decisions comport with sound evidential theory.

The defendant wrongly characterizes the testimony of the police officers as hearsay; that is, as extra-judicial statements offered to prove the truth or falsity of the facts asserted which deny the accused the right to confront his accusers. *McCormick, Law of Evidence*, 460 (1954); *New Jersey Rule of Evidence 63*. Properly construed, the calls were offered to prove the calls themselves as operative facts. When viewed in light of that purpose, the evidence is without the proscription of the hearsay exclusion. *McCormick, supra*, at 463. See, *e.g., Commonwealth v. Wiswesser*, 134 Pa. Super. 488, 3 A. 2d 983 (1939) (testimony as to defendant's agent to juror not hearsay in a prosecution for solicitation of juror). Indeed, this concept is embodied in annotation to *New Jersey Evidence Rule 63* prepared by the Rules of Evidence Study Commission. It provides:

> Evidence that the owner of a car gave instructions to a driver is not hearsay if offered to prove agency;

but it would be hearsay if the content of the instructions related to delivery, and were offered to prove delivery.

To interpose: evidence that a hopeful bettor gave a bet to a bookmaker is not hearsay if offered to prove bookmaking; but it would be hearsay if the content of the message related to a specific horse-race and were offered to prove the existence of same. See also *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410 (App. Div. 1961), *cert. den.*, 36 N.J. 297 (1962).

CONCLUSION

The decisions below rested upon both prevailing constitutional doctrine as well as specific local decisions which have considered the problems with not only constitutional sensitivity but with greater particularity. Accordingly, on the basis of the authorities advanced as applied to the record below the respondent prays that the petitioner's Writ of Certiorari be denied.

Respectfully submitted,

/s/ James Greenberg
JAMES GREENBERG
Counsel for Respondent